

#798

Decision **DRAFT DECISION OF ALJ O'DONNELL** (Mailed 6/21/2002)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Application of Level 3 Communications, LLC (U-5941-C) to Expand Its Certificate of Public Convenience and Necessity to Provide Local Exchange Telecommunications Services in the Service Territories of Citizens Telecommunications Company of the Golden State, Inc.; Evans Telephone Company; and Sierra Telephone Company, Inc.

Application 02-03-012
(Filed March 8, 2002)

OPINION DENYING APPLICATION**Summary**

Level 3 Communications, LLC (U-5941-C) (Applicant) filed this application for authority to expand its current certificate of public convenience and necessity (CPCN) under Pub. Util. Code § 1001 to provide local exchange services in the service territories of Citizens Telecommunications Company of the Golden State, Inc. (Golden State), Evans Telephone Company (Evans), and Sierra Telephone Company, Inc. (Sierra). By this decision, we deny the application because we have not developed the rules necessary to open the requested service areas to local exchange competition.

We also establish requirements Applicant will have to meet if it chooses to file a notice of a request to an incumbent local exchange carrier (ILEC) for interconnection, services, or network elements, pursuant to Section 251(f) of the Telecommunications Act of 1996.

Background

The Commission granted Applicant authority to provide limited facilities-based and resold local exchange and interexchange services by Decision (D.) 98-03-066 and D.98-02-119. Applicant is authorized to provide local exchange services in the service territories of Pacific Bell Telephone Company (Pacific), Verizon California Inc. (Verizon), Roseville Telephone Company (RTC), and Citizens Telecommunications Company of California (CTC).

In this application, Applicant requests authority to provide local exchange services in the service territories of Golden State, Evans, and Sierra.¹ However, it does not seek interconnection under Section 251(c) of the Telecommunications Act of 1996 at this time, nor does it seek to challenge Golden State, Evans, and Sierra's exemptions under Section 251(f).

Protests

Golden State, Evans, and Sierra filed protests to the application. They point out that when the Commission opened Pacific and Verizon's service territories to competition, it first opened a rulemaking to consider the issues and to promulgate rules for doing so. The Commission did so again when it opened RTC and CTC's service areas to competition. They ask the Commission to deny the application because the Commission has not opened the service territories of the small incumbent local exchange carriers (small ILECs), such as Golden State, Evans, and Sierra, to competition through such a rulemaking.

¹ Applicant intends to provide purely data and advanced services, and not voice (dial tone) service.

Discussion

In D.97-09-115, the Commission established rules for local exchange competition in RTC and CTC's service territories. The Commission also said that it would proceed in the future with the development of rules for local exchange competition in the small ILEC's territories. We have not done so and, as a result, we have not authorized local exchange competition in those territories.

Applicant says that rules are not necessary because: (1) it does not seek to impose the same local exchange competition obligations on the small ILECs as those established in D.95-07-054 and D.97-09-115; and (2) it agrees to comply with the rules established in D.95-07-054 and D.97-09-115 to the extent they apply to Golden State, Evans, and Sierra. What Applicant is proposing is, in essence, a special set of rules for the services it proposes to offer. As was the case for competition in Pacific, Verizon, RTC and CTC's territories, we believe that rules for competition should be developed before it is allowed. Piecemeal development of such rules through an application such as this does not permit all parties, including the other small ILECs, to be heard. In addition, adoption of such rules in this proceeding would set a precedent for competition by Applicant and other carriers in other small ILECs' territories. Therefore, we will deny Applicant's request.

Applicant says that it does not seek interconnection under Section 251(c) of the Telecommunications Act of 1996 at this time. This implies that, in the future, it may choose to seek interconnection under Section 251(c), and seek to challenge Golden State, Evans, and Sierra's exemptions under Section 251(f). Therefore, we will specify the requirements for such a filing.

Requirements for Challenging Small ILEC Exemptions Under Section 251(f).

Section 251 addresses interconnection between telecommunications carriers. Section 251(a) specifies general duties of telecommunications carriers. Section 251(b) specifies obligations of all local exchange carriers. Section 251(c) specifies additional obligations each incumbent local exchange carrier (ILEC) must meet. Section 251(f) provides that ILECs such as Golden State, Evans, and Sierra are exempt from Section 251(c) until: (1) they have received a bona fide request for interconnection, services, or network elements; and (2) the state commission has determined that such request is not unduly economically burdensome, is technically feasible, and is consistent with specified portions of Section 254 of the Telecommunications Act of 1996.

Section 251(f) provides that a local exchange carrier making a bona fide request for interconnection, services, or network elements must submit a notice of its request to the Commission. The Commission is required to conduct an inquiry to determine whether to terminate the exemption. Within 120 days of receipt of the notice, the Commission is required to terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with specified portions of Section 254.² If the Commission determines the exemption should be terminated, it must establish a schedule for compliance with the request.

In order to determine whether to terminate the exemption in the time allowed, it is necessary that the notice be filed in a way that would provide the Commission with sufficient information, and allow the subject ILEC adequate

² Section 254 deals with universal service.

time to respond. Therefore, we will require that the notice be filed in the form of an application. The application shall contain a full and complete explanation supporting Applicant's contention that the request is not unduly economically burdensome, is technically feasible, and is consistent with specified portions of Section 254. The application shall also propose and justify an implementation schedule that is consistent in time and manner with Commission regulations. The application, along with a copy of Applicant's workpapers, shall be served on the ILEC that received the request. Since the Applicant would be requesting termination of the exemption, and will be the beneficiary of such termination, it will have the burden of proving that the exemption should be terminated. When the application is filed, Applicant should be ready to go to hearing so that, if hearings are necessary, they can proceed expeditiously. If the Application is not properly served, or does not satisfy the above requirements, it will be deemed incomplete and rejected.

Categorization and Need for Hearings

In Resolution ALJ 176-3084 dated March 21, 2002, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. Protests were filed. However, neither Applicant nor the protestants requested hearings. There are no issues of fact for which hearings would be required. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

Comments on Draft Decision

The draft decision of ALJ Jeffrey P. O'Donnell in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. Comments were filed by

Applicant, Golden State, Evans, and Sierra. All comments were considered. Some changes were made to clarify the decision.

Request to File Under Seal

Applicant requests that the financial information filed with the application be filed under seal. The financial information consists of Applicant's estimated customer bases for its first and fifth years. Applicant represents that the information is proprietary and sensitive. The information, if revealed, would place Applicant at an unfair business disadvantage. We have granted similar requests in the past and will do so here.

Findings of Fact

1. Applicant is authorized to provide limited facilities-based and resold interexchange services.
2. Applicant is authorized to provide limited facilities-based and resold local exchange services in the service territories of Pacific, Verizon RTC, and CTC.
3. The Commission has not developed rules for local exchange competition in the small ILEC's territories and, as a result, has not authorized local exchange competition in those territories.
4. Applicant is requesting, in essence, a special set of rules for the services it proposes to offer.
5. Rules for competition should be developed before it is allowed.
6. Piecemeal development of rules through an application such as this does not permit all parties, including the other small ILECs, to be heard.
7. Adoption of rules in this proceeding would set a precedent for competition in other small ILECs' territories.

8. Section 251(a) of the Telecommunications Act of 1996 specifies requirements each ILEC must meet in order to facilitate competition in its service territory.

9. Section 251(f) provides that ILECs are exempt from Section 251(c) until (1) they have received a bona fide request for interconnection, services, or network elements, and (2) the state commission has determined that such request is not unduly economically burdensome, is technically feasible, and is consistent with specified portions of Section 254.

10. Applicant does not seek interconnection under Section 251(c) at this time, nor does it seek to challenge Golden State, Evans, and Sierra's exemptions under Section 251(f).

11. The Commission has not authorized local exchange competition in the service territories of small ILECs.

12. Within 120 days of receipt of a notice of a bona fide request for interconnection, services, or network elements, the Commission is required to terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with specified portions of Section 254.

13. If the Commission determines that the exemption should be terminated, it must establish a schedule for compliance with the request.

14. The Applicant will be the beneficiary of such termination.

15. Public disclosure of the financial information filed under seal would place Applicant at an unfair business disadvantage.

16. Neither Applicant nor the protestants requested hearings.

17. There are no issues of fact for which hearings are needed.

Conclusions of Law

1. The application should be denied.

2. In order to determine whether to terminate the exemption in the time allowed, the notice should be filed in a way that would provide the Commission with sufficient information, and allow the subject ILEC adequate time to respond.

3. The notice should be filed in the form of an application.

4. The application should contain a full and complete explanation supporting Applicant's contention that the request is not unduly economically burdensome, is technically feasible, and is consistent with specified portions of Section 254.

5. The application should propose and justify an implementation schedule that is consistent in time and manner with Commission regulations.

6. The application, along with a copy of Applicant's workpapers, should be served on the ILEC that received the request.

7. When the application is filed, Applicant should be ready to go to hearing.

8. If the Application is not properly served, or does not satisfy the Commission's requirements, it should be deemed incomplete, and rejected.

9. Applicant's request to have the financial information filed with this application kept under seal should be granted.

10. No hearings are necessary.

O R D E R

IT IS ORDERED that:

1. The application of Level 3 Communications, LLC (Applicant) to provide local exchange services in the service territories of Citizens Telecommunications Company of the Golden State, Inc., Evans Telephone Company, and Sierra Telephone Company, Inc. is denied.

2. If Applicant makes a bona fide request to an incumbent local exchange carrier (ILEC) for interconnection, services, or network elements, pursuant to

Section 251(f) of the Telecommunications Act of 1996, it shall file the notice of the request with the Commission in the form of an application.

3. The application shall contain a full and complete explanation supporting Applicant's contention that the request is not unduly economically burdensome, is technically feasible, and is consistent with specified portions of Section 254 of the Telecommunications Act of 1996.

4. The application shall propose and justify an implementation schedule that is consistent in time and manner with Commission regulations.

5. The application, along with a copy of Applicant's workpapers, shall be served on the ILEC that received the request.

6. When the application is filed, Applicant should be ready to go to hearing.

7. If the Application is not properly served, or does not satisfy the above requirements, it shall be deemed incomplete, and rejected.

8. Applicant's request to have the financial information filed with this application kept under seal is granted for two years from the effective date of this decision. During that period the information shall not be made accessible or disclosed to anyone other than the Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge.

9. If Applicant believes that further protection of the information kept under seal is needed, it may file a motion stating the justification for further withholding of the information from public inspection, or for such other relief as

the Commission rules may then provide. This motion shall be filed no later than one month before the expiration date.

10. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.